Office - Supreme Court, U.S.
FILED
OCT 31 1983
ALEXANDER L. STEVAS,
CLERK

Nos. 82-206, 82-229

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

FIREFIGHTERS LOCAL UNION NO. 1784,

Petitioner,

v.

CARL W. STOTTS, et al.

MEMPHIS FIRE DEPARTMENT, et al.,

Petitioners,

v.

CARL W. STOTTS, et al.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENTS

THOMAS M. DANIEL
RICHARD B. FIELDS*
COX & FIELDS
7007 Adams Avenue
Memphis, Tennessee
(901) 525-8601

JACK GREENBERG
O. PETER SHERWOOD
CLYDE E. MURPHY
RONALD L. ELLIS
ERIC SCHNAPPER
Suite 2030
10 Columbus Circle
New York, New York 10019
(212) 586-8397

BARRY L. GOLDSTEIN
Suite 940
806 15th Street, N.W.
Washington, D.C. 20005
(202) 638-3278

Attorneys for Respondents

*Counsel of Record

QUESTIONS PRESENTED*

1. Is this appeal moot?

2. Did the district court abuse its discretion in issuing a preliminary injunction limiting the laying off of black employees?

3. Is the consent decree, as construed by the courts below, valid?

---

*The parties to this appeal are set forth in the Brief on the Merits for Petitioner Firefighters Local Union No. 1784 (hereinafter "Union Brief").

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	ii
Table of Authorities	iii
Statement of the Case	1
Summary of Argument	16
Argument	24
I. This Appeal Is Moot	24
II. The District Court Did Not Abuse Its Discretion in Issuing a Preliminary Injunction Limiting the Laying Off of Black Employees	45
III. The 1980 Consent Decree, As Construed by the Courts Below, Is Valid	78
Conclusion	105
Appendix A: Exhibit A to the 1980 Consent Decree	1l
Appendix B: Blacks Hired Pursuant to the 1980 Consent Decree	1b
Appendix C: Blacks Promoted Pursuant to the 1980 Consent Decree	1c
Appendix D: Least Senior Privates, June 1981	1d
Appendix E	1e

TABLE OF AUTHORITIES

Page

Cases

Alabama v. United States, 279 U.S. 229 (1929) 49

Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) 91

Bratton v. City of Detroit, No. 80-1837 (6th Cir.) 43

Brown v. Chote, 411 U.S. 452 (1973) ... 49

Brown v. Neeb, 644 F.2d 551 (6th Cir. 1981) 52,66

Carroll v. President and Commissioners of Princess Anne, 393 U.S. 175 (1968) 37,41

Carson v. American Brands, Inc., 450 U.S. 79 (1981) 90,97

Chrysler Corporation v. United States, 316 U.S. 556 (1942) 68,69

Doran v. Salem Inn, Inc., 422 U.S. 922 (1975) 19,49

Dunn v. Blumstein, 405 U.S. 330 (1972) .. 40

EEOC v. American Telephone & Telegraph Co., 556 F.2d 167 (3d Cir. 1977), cert. denied, 438 U.S 915 (1978) 87,95

Ford Motor Co. v. EEOC, ___ U.S.___, 73 L.Ed.2d 721 (1982) 24,90,91,100

Franks v. Bowman Transportation Co., 424 U.S. 747 (1976) 86

Cases	Page
Fulenwider v. Firefighters Ass'n. Local U. 1784, 649 S.W.2d 268 (Tenn. Sup. Ct. 1982)	104
Gannett Co. v. DePasquale, 443 U.S. 368 (1979)	18,40
Gautreaux v. Pierce, 535 F. Supp. 423 (N.D. Ill. 1982)	68
Gerstein v. Pugh, 420 U.S. 103 (1975)	40
Hughes v. United States, 342 U.S. 353 (1952)	65
International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977)	
Lane v. Williams, 455 U.S. 624 (1982)	34
Minnick v. Department of Corrections, No. 79-1213	101
Moore v. Ogilvie, 394 U.S. 814 (1969)	40
Murphy v. Hunt, 455 U.S. 478 (1982)	18,34
National Fire Insurance Co. v. Thompson, 281 U.S. 331 (1930)	49
Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976)	40
Occidental Life Insurance Co. v. EEOC, 432 U.S. 355 (1977)	90
Orders v. Stotts, No. 82-204, October Term, 1982	94

Cases	Page
Roe v. Wade, 410 U.S. 113 (1973)	19,40
Rosario v. Rockefeller, 410 U.S. 752 (1973)	40
SEC v. Sloan, 436 U.S. 103 (1978)	37,41
Sosna v. Iowa, 419 U.S. 393 (1975)	35,30
Southern Pacific Terminal Co. v. ICC, 219 U.S. 498 (1911)	33
Stotts v. Memphis Fire Department, No. 80-1489 (6th Cir.)	94
United Fuel Gas Co. v. Public Service Commission, 278 U.S. 322 (1929)	49
United States v. Armour & Co., 402 U.S. 673 (1971)	52
United States v. Corrick, 298 U.S. 435 (1936)	49
United States v. ITT Continental Banking Co., 420 U.S. 223 (1975)	21,52
United States v. New York Telephone Co., 434 U.S. 159 (1977)	37
United States v. Swift & Co., 287 U.S. 106 (1932)	65
United States v. United Shoe Machinery Corp., 391 U.S. 244 (1968)	68,69
United Steelworkers of America v. Weber, No. 76-432, 443 U.S. 193 (1979)	88,97

Page

University of Texas v. Camenisch, 451 U.S. 390 (1981) 39,46,49

Weakley Co. Municipal Electric System v. Vick, 309 S.W.2d 792 (Tenn. Ct. App. West. Sect. 1957) 103

Weinstein v. Bradford, 423 U.S. 147 (1975) 34

Williams v. City of New Orleans, No. 82-3435 (5th Cir.) 43

Statutes

42 U.S.C. § 1981 2

42 U.S.C. § 1983 2

Title VII, Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, et seq. ..... passim

Section 703(h), 42 U.S.C § 2000e-5(h) ..... passim
Section 706(g), 42 U.S.C. § 2000e-5(g) ..... passim

Other Authorities

Assirmative Action Appropriate Under Title VII of Civil Rights Act of 1964, As Amended, 29 CFR § 1608 (1982) ... 88

Executive Order No. 12067 88

42 Opinion of Attorney General No. 37 (Sept. 22, 1969) 89

Uniform Guidelines on Employee Selection Procedures, 29 CFR § 1607 89

Nos. 82-206, 82-229

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

FIREFIGHTERS LOCAL UNION NO. 1784,

Petitioner,

v.

CARL W. STOTTS, et al.

MEMPHIS FIRE DEPARTMENT, et al.,

Petitioners,

v.

CARL W. STOTTS, et al.

On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR RESPONDENTS

STATEMENT OF THE CASE

On February 16, 1977, respondent Carl Stotts, a black Memphis firefighter, filed this class action alleging that

the Memphis Fire Department had engaged in racial discrimination in hiring and promotion in violation of the Fourteenth Amendment, 42 U.S.C. §§ 1981 and 1983, and Title VII of the 1964 Civil Rights Act. (J.A. 9-12). Stotts specifically claimed that he had been denied promotions solely because of his race. (J.A. 10). On June 19, 1979, respondent Fred L. Jones, also a black city firefighter, filed a complaint with similar allegations, complaining in particular that he had been denied promotion to the position of Fire Inspector solely because of his race. (J.A. 15-17). The two proceedings were consolidated in the district court.

This private litigation took place against the background of a prior consent decree entered into by the City of Memphis and the United States Department of Justice

in 1974. (J.A. 98-115). The 1974 Consent Decree, which applied to several Memphis city agencies, including the fire department, required Memphis to achieve "throughout the work force proportions of black ... employees in each job classification approximating their respective proportions in the civilian work force." (J.A. 101). In 1981, however, after the United States decree had been in effect for seven years, less than 12% of the uniformed fire department employees were black,[1/] although blacks accounted for 35% of the Memphis area work force.[2/] In addition, many of the positions beyond the entry level jobs remained all-white or virtually all-

---

1/ Exhibit C, Plaintiffs' Supplemental Memorandum In Support of a Preliminary Injunction.

2/ City Petition A22.

white.[3/] On April 25, 1980, after the completion of extensive discovery, the parties to the private litigation entered into a consent decree. Paragraph 6 of that decree obligated the city "to raise the black representation in each job classification to levels approximating the black proportion of the civilian labor force." (City Petition A64). The decree contained several more specific, although not exclusive, requirements as methods of achieving this goal. With regard to hiring, paragraph 7 required the city to attempt to fill "on an annual basis at least 50% of all vacancies with qualified black applicants." (Id.) The city also agreed that

---

3/ Exhibit C, Plaintiffs' Supplemental Memorandum in Support of a Preliminary Injunction. These positions included Fire Maintenance Mechanic (21 whites, 0 blacks), District Chief (35 whites, 1 black), Fire Alarm Operator III (20 whites, 1 black), Captain (84 whites, 2 blacks) and Driver (296 whites, 15 blacks).

in making promotions it would seek to assure that "at least 20%" of the firefighters promoted into each position were black, (Id. at A65); this obligation was included to ensure that the overall goal was reached "as quickly as practicable". (Id.). The decree required the city to give specified promotions to the two named plaintiffs and to several other named black employees listed in an Exhibit A.[4/] Some of these promotions were to occur immediately, while others were to occur as soon as the named individuals passed examinations for the positions involved. The decree expressly recited that its purpose was "to remedy the past hiring and promotion practices of the Memphis Fire Department", (id. at A64) and "to insure

---

4/ Exhibit A is set forth in Appendix A to this brief.

that any disadvantage to minorities that may have resulted from past hiring and promotional practices be remedied...." (Id. at A60). The district court was authorized to issue "such further orders as may be necessary or appropriate to effectuate the purpose of this decree." (Id. at A69)

During the year after the entry of the consent decree a number of problems arose. Although the decree required the "immediate promotion" of eight black firefighters listed in Exhibit A, the city did not actually promote them[5/] for several months following final approval of the decree, and then only after the plaintiffs filed a Motion to Enforce the Consent Decree

---

5/ The city did increase the salaries of these employees following approval of the consent decree, but refused to give them the rank, insignia, or assignments to which they were entitled.

on July 25, 1980. In addition, the city declined to hold a test for the position of District Chief, thus preventing plaintiff Stotts from obtaining the promotion guaranteed to him under Exhibit A of the decree. Since paragraph 5 of the decree required that promotional examinations be given "on a regular basis, but in any event, at least every two years" (City Petition A64), the city's continued refusal to conduct a District Chief test after December, 1980, the second anniversary of the last such test, was a clear violation of the decree. Nonetheless, by the end of the first year of the decree the city filed reports stating that, pursuant to the decree, a total of 18 new black employees had been hired,[6/] and a total of 18 black fire-

---

6/ See Appendix B to this brief.

fighters had received promotions.[7]

On May 4, 1981, however, the city announced that, because of financial problems, it intended to demote and lay off a significant number of firefighters. The employees to be laid off or demoted were to be chosen under a Layoff Policy that had been formulated by the city on April 29, 1981. (J.A. 82-95). A list of Fire Department personnel, also issued on May 4 by the city, contained the names of 39 fire officers initially slated for demotion; among that group were 23 blacks, including 8 who had received their promotions under the consent decree.[8] The city ultimately proposed to demote 14 of the 18 blacks promoted under the decree, including 4 of the 8 blacks whose promotions were ex-

---

7/ See Appendix C to this brief.

8/ The list was annexed as Exhibit B to Plaintiffs' Supplemental Memorandum in Support of a Preliminary Injunction.

pressly required under Exhibit A,[9] and to lay off 15 of the 18 blacks who had been hired under the decree.[10]

On May 4, 1981, plaintiffs sought and obtained a temporary restraining order forbidding the demoting or laying off of any employees in the Fire Department. (J.A. 20-23). On May 7, 1981, Firefighters Local Union No. 1784 was permitted to intervene in this action with the consent of the parties. (J.A. 3). On May 8, 1981, four days after the city announced the proposed layoffs, a hearing was held on respondents' request for a preliminary injunction (J.A. 29-81). Following that hearing the district court lifted its total prohibition against the laying off or demotion of black employees. The

---

9/ See Appendix C to this brief.

10/ See Appendix B to this brief.

court held that the city could demote or lay off black employees, but only so long as it did not reduce the percentage of blacks in four specified positions -- lieutenant, driver, inspector and private. (City Petition A76, A78). The court directed the city to submit for its approval a plan for making any demotions or layoffs. (Id.) This preliminary injunction, announced from the bench on May 8, 1981, was memorialized in an order issued on May 18, 1981. The city and union filed a notice of appeal on May 18, 1981. (J.A. 5).

On June 22, 1981, plaintiffs filed a Motion for Additional Relief, seeking to extend the rule contained in the May 18 preliminary injunction to five other positions in which demotions or layoffs were then scheduled -- Fire Alarm Operator

I, Home Fire Safety Representative, Fire Prevention Supervisor, Clerk Typist, and Research and Development Lieutenant. (J.A. 123). Plaintiffs also noted that the city had not filed its proposed plan for compliance with the May 18 order, and requested that it be required to do so. A hearing on this motion was held on June 23, 1981. Although the city did not submit a written plan to the court, the city Personnel Director testified at that hearing that the city proposed to comply with the May 18 order by exempting from demotion or layoff a sufficient number of blacks to avoid reducing the percentage of blacks in the four positions covered by that order. (J.A. 134-35). In an order dated June 25, 1981, the district court approved that plan, but did not issue any order requiring the city to

implement it. (City Petition A83). The court refused to extend its May 18 order to the positions of Home Fire Safety Representative or Research and Development Lieutenant, applying it only to the additional classifications of Fire Alarm Operator I, Clerk Typist and Fire Prevention Supervisor. (Id.) Neither the city, the union, nor the plaintiffs appealed from the June 25 order.

The actual impact of the May 18 preliminary injunction on the layoffs in the Fire Department was extremely limited. The city ultimately decided to lay off only 24 privates. To comply with the May 18 order it was necessary that no more than 3 of those laid off be black; under the city's own Layoff Policy, 6 of the 24 privates who would have been laid off were

black.[11/] Thus only three additional whites were actually laid off as a result of the May 18 order. Those three white employees,[12/] who were laid off on June 26 and 27, 1981, were reinstated on July 19, July 20, and July 23, 1981,[13/] respectively, each having been out of work less than four weeks.

The plaintiffs never sought a final injunction with regard to the 1981 layoffs or demotions. The July, 1981, recalls made any further injunctive relief regarding layoffs entirely unnecessary. Once the total number of privates on layoff

---

11/ See Appendix D to this brief. The operation of that policy is described in detail at pp. 82-84, infra.

12/ Stanley Darden, Gary Dennington, and Larry Harmon.

13/ These are the recall dates listed in the personnel files of the three white employees.

fell below 22, the application of the city's April 29 Layoff Policy itself assured that the proportion of black privates would not be lower than the pre-layoff level.[14/] Neither the city nor the union ever asked for a trial to finally resolve whether plaintiffs were entitled to injunctive relief, or sought to lift the preliminary injunction on the ground that the plaintiffs had failed to do so. This is hardly surprising, for after July 23, 1981, the May 18 preliminary injunction no longer had any operative effect on layoffs of Fire Department employees.

Both the city and the union, however, vigorously pursued their appeal from the May 18 preliminary injunction. On May 7, 1982, the court of appeals affirmed the

---

14/ Only 3 of the 21 least "senior" privates were black. See Appendix D.

decision of the district court granting the preliminary injunction. The court of appeals found that the issuance of that preliminary relief was not an abuse of discretion. (City Petition A31.). More specifically, the Sixth Circuit held that there was a reasonable probability the plaintiffs would prevail on the merits, that the proposed layoffs would cause irreparable injury, and that the granting of preliminary relief was in the public interest. (Id.) The city and union petitioned for writs of certiorari to review the court of appeals decision upholding the May 18 order insofar as it granted a preliminary injunction regarding layoffs.[15/]

15/ The Questions Presented in both the union and city petitions are expressly limited to "layoffs." Although both petitions note that the decisions below also concerned demotions (City Petition 3, 5; Union Petition 4, 5), the arguments contained in the petitions in support of granting the writs refer to layoffs

SUMMARY OF ARGUMENT

I This is an appeal from a preliminary injunction granted on May 18, 1981. The clear intent of that injunction was only to partially preserve the status quo threatened by then imminent layoffs, not to establish any permanent rule governing layoffs. The preliminary injunction merely preserves 1981 black employment levels, and is thus literally inapplicable to layoffs in 1983 or later in positions in which black representation now exceeds 1981 levels.

Only three whites were actually laid off as a result of the May 18 order --

---

15/ continued

(City Petition 8, 15; Union Petition 8, 9). While the issue before this Court may thus be limited to layoffs, we note where appropriate the facts relevant to the proposed and actual demotions.

Stanley Darden, Gary Dennington, and Larry Harmon. All three were recalled within a month, and have been back at their jobs throughout this appeal. Every person laid off or demoted from a position affected by the May 18 order has now been reinstated. That order thus has no present effect, and the underlying controversy is moot.

Petitioners earlier advised the Court that the May 18 order had a continuing impact on white workers, but that representation was inaccurate. The order did not preclude whites from taking promotional examinations, since no such tests were given while the layoffs were in effect. Neither did the preliminary injunction postpone the automatic promotion to captain given to certain firefighters with over 30 years service; that automatic promotion applies only to firefighters hired prior to 1977, and all the firefighters who were

laid off had been hired in 1979 or later.

This is not a dispute "capable of repetition, yet evading review." That exception to the usual mootness rules applies only where there is a "demonstrated probability" the dispute will recur. Murphy v. Hunt, 455 U.S. 478, 482 (1982). Memphis has laid off firefighters only once in its 162 year history, and is unlikely to do so again while the consent decree remains in effect. Layoffs are not by their nature so short-lived that controversies about them can never be reviewed on appeal. Compare Garnett Co. v. DePasquale, 443 U.S. 368, 377 (1979)(pre-trial hearing), Roe v. Wade, 410 U.S. 113, 125 (1973)(pregnancy). Layoffs in both private industry and the public sector often go on for years; many of the "layoffs" in the steel industry, for example, are apparently permanent.

II. Since the order appealed from is only a preliminary injunction the question before this Court is whether the district court abused its discretion in entering an order to protect the status quo. Doran v. Salem Inn, Inc., 422 U.S. 922, 932 (1975). The standard for granting such preliminary relief is whether the plaintiff is likely to prevail on the merits, and whether the plaintiff would suffer irreparable injury were that relief denied.

The proposed layoffs would have violated the consent decree in several ways. (1) Between April 1980 and May 1981 the defendants, to comply with the decree, hired 18 new black firefighters and promoted 18 others; the city proposed in the spring of 1981 to dismiss 15 of the new hires and to rescind 14 of the promotions. Exhibit A of the decree specifically required the promotion of 9 named indi-

viduals, including plaintiff Fred Jones; the city proposed to rescind 6 of those promotions. (2) Paragraph 6 of the decree required the city to "raise" minority representation in each position to levels comparable to the civilian labor force. Paragraph 8 contemplates that this goal is to be achieved "as quickly as possible." The proposed layoffs and demotions would have reduced minority representation, and delayed the attainment of the mandated employment levels. (3) The expressed purpose of the decree is to remedy "any disadvantage that may have resulted from past hiring and promotional practices." (City Petition A60-A61). Based on the necessarily limited record available at the preliminary injunction hearing, the district court was justified in concluding that the proposed layoffs would "perpetuate discrimination". (J.A. 30-31).

In considering the likelihood that plaintiffs would prevail on the merits, the district court properly restricted its inquiry to the language and purpose of the consent decree. United States v. ITT Continental Baking Co., 420 U.S. 223 (1975). The district judge's construction of that decree is entitled to particular deference since he was the same judge who had earlier approved the decree and monitored its implementation.

The preliminary injunction did not require the city to utilize a race-conscious layoff plan. That order left the city free to adopt any plan for reducing personnel, or otherwise cutting costs, which would have avoided any disparate impact on minorities. The Firefighters Union offered a number of racially neutral plans. Neither plaintiffs nor the district court expressed any preference regarding how

compliance was to be achieved. The choice of a race-conscious layoff plan was made by the city itself, which cannot now be heard to complain about its own selection. The union may still disagree with that choice, but it never appealed from the district court order of June 25, 1981, approving the plan.

III. Petitioners contend that the consent decree, as construed by the courts below, volates Title VII. Their contentions, if sustained, would virtually prohibit the use of consent decrees in Title VII actions.

Petitiones urge, first, that under section 703(h) of Title VII, no consent decree can provide any relief adversely affecting the seniority rights of whites, until and unless there has been a judicial determination that every minority beneficiary of the decree was an actual victim of

discrimination. They also contend that section 706(g) requires such an adjudication before a court can order into effect a consent decree containing injunctive relief requiring hiring or promotion adversely affecting the interests of whites.

This construction of Title VII has no support in the language of the statute, in its legislative history or in the cases decided thereunder. Moreover, such a construction would, if sustained, require an employer to take to trial legal or factual claims to which it knew there was no defense. Complaints seeking hiring, promotions, or constructive seniority could never be settled on terms favorable to plaintiffs. Such an extraordinary limitation on the voluntary resolution of Title VII litigation is inconsistent with Congress' expressed preference for conciliation and settlement. Ford Motor Co. v.

EEOC, ___ U.S. ___, 73 L.Ed.2d 721 (1982).

Petitioners and the United States assert that, as a result of the May 18 order, junior black employees were retained while whites "with more years of service" were laid off. (U.S. Brief, p. 21). This is not true. The three whites laid off as a result of that order were hired on the same date as the three blacks who remained at work. Under the City's Layoff Policy these whites were to have kept their jobs, rather than the blacks, solely because employees with equal terms of service and comparable personnel records were ranked alphabetically. Whatever protection section 703(h) may afford to seniority systems, it conveys no comparable special status on alphabetization.

ARGUMENT

I. THIS APPEAL IS MOOT

The May 18 order from which the city

and union have appealed is not a permanent injunction regulating all future layoffs, but a preliminary injunction clearly intended to control only the particular layoffs that were impending in the spring of 1981. The order is expressly headed "Order Granting Preliminary Injunction." (City Petition A77). It applies only to the four particular positions -- lieutenant, driver, inspector and private -- in which demotions or layoffs were then planned. (Id. at A78). The minimum percentage of blacks which the city was to retain was that of blacks "presently employed" in those positions, (Id. at A76, A78)(emphasis added), a standard which would make no sense if applied to future layoffs when minority employment levels would doubtless be higher than in 1981. Since the proportion of privates, lieutenants and drivers is higher today than in 1981, the May 18, 1981, order would be

literally inapplicable to layoffs or demotions occurring in 1983 in those positions.[16/] The district judge's reasoning was expressly based on the particular circumstances that existed in 1981, "the effect of these layoffs and reductions in rank" (Id. at A78) and the fact that in that year only 11 percent of the Fire Department employees were black. (Id. at A75).

All of the 1981 layoffs and demotions which were the subject of the May 18 preliminary injunction have since ended.

16/ The proportion of blacks in each position were as follows:

Position	Percent Black January 1981	Percent Black September 1983
Private	13.6%	16.2%
Driver	4.8%	5.2%
Lieutenant	12.1%	14.0%

(City Petition, A11; Fire Department Employee List, September 7, 1983.)

By the spring of 1983 every Fire Department employee who had been laid off or demoted in 1981 had been offered back his old position. The preliminary injunction ceased to have any operative significance long before certiorari was granted, since most of those who were laid off or demoted following the issuance of that injunction would have been subject to the same action even if no injunction had ever been granted. In the case of the layoffs subject to the May 18 preliminary injunction, 21 of the 24 individuals actually laid off would have also been laid off under the city's own April 29 Layoff Policy. Only three whites were actually laid off as a result of the May 18, 1981, order, and the last of them returned to work on July 23, 1981.

Whether the May 18 preliminary injunction is upheld or reversed on appeal is a

matter devoid of any practical consequence. No white is now out of work, or in a lesser position, because of that order, and no black is any longer retained in his or her job because of it. If the May 18 preliminary injunction is upheld by this Court, no black employee will receive any benefit; if that order is reversed, no white will profit thereby. Because the May 18 order is literally inapplicable to any future controversy, whether or not it is sustained on appeal will not directly effect any layoffs or demotions that might occur subsequent to the decision of this Court.

Petitioners, however, have represented to this Court that the May 18 order has a continuing impact on white employees. Petitioners' Joint Opposition to Respondents' Suggestion of Mootness, pp. 5-7. First, petitioners assert:

> [T]hose firefighters entitled under municipal charter to promotion to captain after 30 years' service (City of Memphis Charter, §67) will be delayed in the realization of this entitlement as a result of their layoff. 17/

This is not correct. Section 67 was amended in 1976 to confer automatic promotions only on firefighters hired before September 15, 1976.[18/] All the employees laid off in 1981 were hired in 1979 or later. Second, petitioners assert:

> While reduced in rank ... more senior white firefighters lost their opportunity to take examinations for the purpose of securing promotions to the next higher rank. 19/

This is not correct. Promotional examinations were given on June 15-19, 1981, prior

---

17/ Petitioners' Joint Opposition to Respondents' Suggestion of Mootness, p. 5.

18/ The amendment was proposed by Ordinance No. 2488, and approved by a referendum of city voters on November 2, 1976.

19/ Petitioners' Joint Opposition to Respondents' Suggestion of Mootness, p. 6 n.1.

to the disputed layoffs. The three whites laid off as a result of the May 18 order left their jobs no earlier than June 26, 1981, and returned no later than July 23, 1981; no examinations were given during this 28 day period, or at any time prior to the reinstatement of all the employees on temporary layoff or demotion. Third, petitioners assert:

> During the period white firefighters were laid off, black firefighters with equal or less seniority continued to accumulate seniority while their white counterparts did not. One effect of the layoffs has been to render these white firefighters less senior for purposes of future job decisions and entitlements. 20/

The May 18 order does not forbid the city to give employees seniority credit while they are on layoff; black and white employees accrued no such seniority while

---

20/ Id. at 5.

they were laid off solely as a result of section 6(B) of the city's own Layoff Policy.[21/] If the May 18 order is upheld on appeal, the City of Memphis, which adopted that policy unilaterally in April 1981, could nonetheless, with a stroke of the pen, unilaterally alter that policy to provide the seniority credit in question. Conversely, even if the May 18 order is reversed, employees who were laid off in 1981 still would receive no seniority credit for that period unless the city itself chooses to alter its Layoff Policy. Either way, it is the City of Memphis, not any decision of this Court, which will determine whether such seniority credit is

---

21/ The Layoff Policy was adopted unilaterally by the city in April 1981. Section 6(B) of that Policy reads:

> B. Employees shall not receive seniority credit during their layoff period. (J.A. 95).

given to white or black employees. In addition, the effect of the May 18 order on the seniority of the three whites affected was so small that it is exceedingly unlikely it will ever affect their future employment status even if the city refuses to readjust their seniority.[22/]

Petitioners also suggest that, even if the controversy concerning the May 18 order is itself moot, the layoff dispute which gave rise to it is one "'capable of repetition, yet evading review' Southern Pacific

---

22/ Darden, Dennington and Harmon each lost less than one month of seniority. No "less senior" blacks were retained during their layoff; the three blacks protected by the May 18 order, Jones, Johnson and McFadgon, had the same seniority date as the whites who were laid off in their place. The seniority loss at issue would affect Darden, Dennington and Harmon only in the unlikely event that in making some future layoff, promotion or transfer decision the city were choosing between one of them and Jones or Johnson. McFadgon is no longer employed by the Fire Department.

Terminal Co. v. I.C.C., 219 U.S. 498, 515 (1911)."[23/] But the exception to the usual mootness rule announced in Southern Pacific Terminal and its progeny is not applicable to the instant case.

Petitioners assert that the controversy which led to the May 18 order is "capable of repetition" because "there is no guarantee that ... in the future" there will be no layoffs, and because whether such layoffs will in fact occur is "entirely speculative."[24/] But

> [t]he Court has never held that a mere physical or theoretical possibility was sufficient to meet the test.... If this were true, virtually any matter of short duration would be reviewable. Rather, we have said that there must be a "reasonable expectation" or a "demonstrated probability" that the same controversy will recur involving the same complaining party.

24/ Id. at 3.

Murphy v. Hunt, 455 U.S. 478, 482 (1982).[25/] There is in this case no "demonstrated probability" that a layoff controversy similar to that of 1981 will again occur during the limited period during which the consent decree will remain in effect. The 1981 layoffs that precipitated the May 18 order were the first in the 162 year history of the City of Memphis. At that rate the next layoff will occur in 2143, and will effect only the great-great-

---

25/ See also Lane v. Williams, 455 U.S. 624, 633-34 (1982) (no "reasonable expectation" that defendant would again enter into an uninformed plea bargain); Weinstein v. Bradford, 423 U.S. 147, 149 (1975) (no "demonstrated probability" former inmate would again be incarcerated and seek parole); Sosna v. Iowa, 419 U.S. 393, 399-400 (1975) (Court will not "speculate" that now divorced petitioner meeting state residence requirement would subsequently marry, move from and return to state, and then seek divorce).

great-great-grandchildren of the present employees. Petitioners decline to "guarantee" that there will be no further layoffs while the decree remains in effect, but they also do not suggest that the city's actual financial condition makes such layoffs at all likely. In fact, that financial situation has improved so much since the issuance of the May 18, 1981 order that in 1983 the city found it possible both to hire 63 new firefighters[26] and to reduce the city property tax rate.[27] Even if layoffs were to occur tomorrow, whether they would reduce the proportion or even the number of blacks in any given position would depend on the number and type of layoffs. Had the city

---

26/ Fire Department Employee List, September 7, 1983.

27/ Memphis Commercial Appeal, May 25, 1983, p. A1.

in 1981 laid off 8 privates rather than 24, for example, every firefighter affected would have been white,[28/] and no injunctive relief would have been necessary. The mere possibility that layoffs similar to those in 1981 might occur at some point in the distant future when the decree may still be in effect falls far short of the "reasonable expectation" of recurrence required by the decisions of this Court. See United States v. New York Telephone Co., 434 U.S. 159, 165 n.6 (1977) (controversy regarding pen registers not moot in light of "the Government's determination to continue to use them"); SEC v. Sloan, 436 U.S. 103, 109 n.5 (1978) (controversy regarding SEC procedures not moot in case of "chronic violator" subject to a series of Commission orders); Carroll v President

---

28/ See Appendix D to this brief.

and Commissioners of Princess Anne, 393 U.S. 175, 178 (1968) (controversy regarding injunctions against rallies not moot in case of political activists who "sought to continue their ... rallies").

Should a layoff controversy indeed arise while the consent decree remains in effect, the legal and factual issues presented would doubtless be different than in 1981. The identity and proportion of blacks and whites affected by any future layoff will certainly be different than in 1981; whether a substantial number of the particular blacks then facing demotion or layoff will have been hired or promoted under the consent decree itself cannot be foreseen. Plaintiffs may attempt to prove at such a future hearing, as we did not in this case, that the new layoffs, or the existing or some subsequent Layoff Policy, were motivated by racial considera-

tions or by a desire to evade the requirements of the consent decree. Plaintiffs may seek injunctive relief that is broader or narrower in scope than that obtained in this case. The low proportion of blacks in the fire department work force, a significant factor in the 1981 decision, will, one hopes, have been improved upon. In short, should the district court again be asked to issue a preliminary injunction with regard to layoffs, the legal issues whose probable outcome will have to be assessed, and the equitable considerations and claims asserted by each party, will necessarily differ from the record upon which the district court based its decision in 1981. A future request for a permanent injunction would of course be subject to an entirely different legal standard than that applicable to a motion for a preliminary injunc-

tion. University of Texas v. Camenisch, 451 U.S. 390, 394-98 (1981).

Although the May 18 order regarding layoffs was moot within a month after it was implemented, that does not mean that other decisions regarding layoffs will necessarily or even probably "evade review." This Court has held that requirement satisfied only by disputes which by their very nature were certain to last only a few weeks or months, such as controversies concerning the closing of a court during a pretrial hearing,[29/] pretrial detention,[30/] durational residence require-

---

29/ Gannett Co. v. DePasquale, 443 U.S. 368, 377 (1979); Nebraska Press Ass'n. v. Stuart, 427 U.S. 539, 546-47 (1976) ("[t]hese are by nature short-lived").

30/ Gerstein v Pugh, 420 U.S. 103, 110 n 1 (1975) ("Pretrial detention is by nature temporary,...."); Dunn v Blumstein, 405 U.S. 330, 333 n.2 (1972).

ments,[31] pregnancy,[32] rules governing the nomination of candidates for public office,[33] or orders expressly effective for only a fixed and short period of time.[34] Petitioners assert that layoffs are by their very nature so brief that they "could be expected" to end "during the normal time required for the resolution of the controversy."[35] This contention, if true, would come as welcome news to the hundreds of thousands of men and women who

---

31/ Sosna v. Iowa, 419 U.S. 393, 400-01 (1975); see also Rosario v. Rockefeller, 410 U.S. 752, 756 n.5 (1973).

32/ Roe v. Wade, 410 U.S. 113, 125 (1973).

33/ Moore v. Ogilvie, 394 U.S. 814, 816 (1969).

34/ SEC v Sloan, 436 U.S. 103, 107-110 (1978) (10 day suspension orders); Carroll v President and Commissioners of Princess Anne, 393 U.S. 175, 177 (1968) (10 day injunction).

35/ Petitioners' Joint Opposition to Respondents' Suggestion of Mootness, p. 6.

formerly worked in the steel automobile chemical and other industries, who were laid off years ago and who have no realistic expectation of ever being recalled Municipal layoffs can be as enduring as those in private industry, police officers laid off by New York City in 1975 were not all recalled until 1982 and Detroit police officers laid off in the last recession still have not all be recalled. In fact, layoffs vary enormously in duration; in some instances, as here, employees return to work in a matter of weeks, but in other cases "layoff" is little more than a euphemism for permanent dismissal.

The questions raised and briefed at length by petitioners are not limited to the specific consent decree involved in this case, or to the particular legal status or treatment of layoffs as such, but are for the most part equally applicable to

the validity, construction and "modification" of any consent decree and to all consent decree provisions regarding promotions and other terms and conditions of employment. The arguments advanced by petitioners regarding the special position of seniority systems under Title VII of the 1964 Civil Rights Act concern the effects of a consent decree or judicial order on any aspect of such a system. We note that the amicus brief filed by the United States in this action is substantially the same as amicus briefs it has filed in other actions in which layoffs are not at issue.[36/] Whatever questions of ongoing importance the petitioners, the amici and the Court may believe were raised by the May 18 order

---

36/ Williams v. City of New Orleans, No. 82-3435 (5th Cir.); Bratton v. City of Detroit, No. 80-1837 (6th Cir.).

will not be forever denied appellate review merely because they are not resolved in this moot litigation.

Long forgotten in petitioners' resolute quest for some landmark decision by this Court are Stanley Darden, Gary Dennington, and Larry Harmon -- the only whites actually laid off as a result of the May 18 order. Throughout the period during which this dispute has raged, first in the Sixth Circuit and then in this Court, Darden, Dennington and Harmon have been back at their jobs at the Memphis Fire Department. Their supposed champions, the City of Memphis and the Firefighters Local Union No. 1784, could with a stroke of their pens have restored the month of seniority and the modest income[37/] which

---

37/ The monthly income of Darden, Dennington and Harmon in 1981 was $1267.63. Each of them was laid off for less than a month.

Darden, Dennington and Harmon lost while on layoff. Instead, the city and union have expended subsantial time and effort, and paid counsel fees many times greater than the wages at issue, in a quixotic appeal which can win no possible relief for the individuals on whose behalf it has ostensibly been pursued.[38/] Whether or not the district court abused its discretion in granting the May 18 preliminary injunction, may be a question about which the city and union may wish an advisory opinion, or about which historians of a later generation may debate, but that order today imposes no restrictions on the defendants in this action and confers no benefits on the plaintiffs. The issues briefed by the defendants and amici concerning the meaning

---

38/ Petitioners do not contend, for example, that Darden, Dennington and Harmon would be entitled to an award of back pay if the May 18 order were overturned.

of Title VII are of no greater importance to the black and white employees of the Memphis Fire Department than to the millions of other workers whose rights and expectations may be affected by any construction of that statute. However litigious the counsel in this dispute may be, the resolution of these issues must await the existence of a case whose outcome will in fact have a direct and substantial effect on the interests of the parties themselves.

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN ISSUING A PRELIMINARY INJUNCTION LIMITING THE LAYING OFF OF BLACK EMPLOYEES

Petitioners in this case seek review not of a permanent injunction finally adjudicating their rights, but of a preliminary injunction. "The purpose of a preliminary injunction is merely to preserve the relative positions of the parties

until a trial on the merits can be held ", University of Texas v Camenisch, 451 U.S. 390, 395 (1981). The proceedings here "bear the marks of the haste characteristic of a request for a preliminary injunction." Id at 398. The hearing on that request was held a mere four days after the layoffs were announced. With the exception of a single deposition held the day before the hearing,[39/] no discovery was taken, the trial judge noted that counsel for the parties had not had "the usual time to develop the issues, and take discovery, and exchange information, and to call on each other to state what they think the issues are ...." (J.A. 30). The union intervenors submitted no written brief in the district court, and the brief submitted by

---

39/ Respondents also attempted without success to take the deposition of the city personnel director, Joseph D. Sabatini.

the city understandably contained little of the elaborate argument now offered in this Court. Neither the parties nor the district court at that early stage in this controversy could forsee how many individuals of which race would actually be demoted or laid off for what period of time; the mayor testified, for example, both that "in all likelihood" all those demoted or laid off would be restored to their jobs "within six months" (J.A. 39), and that more layoffs were "a definite possibility." (J.A. 36).

On the limited record usually available in connection with a request for a preliminary injunction, the responsibility of the district court is not to attempt to make a final determination of the merits of the controversy, but to decide whether the party seeking that relief has demonstrated "that in the absence of its issu-

ance he will suffer irreparable injury and also that he is likely to prevail on the merits." Doran v. Salem Inn, Inc., 422 U.S. 922, 931 (1975). The district court may also weigh the interests of the opposing party, id., and of the public. University of Texas v. Camenisch, 451 U.S. 390, 392 (1981). "[T]he standard of appellate review is simply whether the issuance of the injunction, in the light of the applicable standard, constituted an abuse of discretion." Doran v. Salem Inn, Inc., 422 U.S. at 932; Brown v. Chote, 411 U.S. 452, 457 (1973); United States v. Corrick, 298 U.S. 435, 437-38 (1936); National Fire Insurance Co. v. Thompson, 281 U.S. 331, 338 (1930); Alabama v. United States, 279 U.S. 229, 230-31 (1929); United Fuel Gas Co. v. Public Service Commission, 278 U.S. 322, 326 (1929).

The court of appeals, in affirming the issuance of the May 18 order, noted the prerequisites established by this Court for the awarding of such relief (City Petition A30), and concluded that the district judge "did not abuse his discretion in granting the preliminary injunction." (Id. A31). In this Court, however, neither the city nor the union assert in so many words that the granting of that injunctive relief was an abuse of discretion, or that plaintiffs failed to adduce evidence of irreparable injury or probable success on the merits. Rather, petitioners treat this appeal as if it were taken from a permanent injunction, press for a final decision on the merits of the controversy, and ask the Court to "dismiss the request for injunctive relief." (City Brief, p. 38)

Although the briefs of petitioners do not directly address the relevant standard of review, we treat them as asserting that the granting of a preliminary injunction was an abuse of discretion, either because there was no likelihood that plaintiff could prevail on the merits, or because of the scope of the injunctive relief granted.

Both petitioners and the United States discuss at length the legislative history of various provisions of Title VII of the 1964 Civil Rights Act. Had the May 18 order been preceded by and based on a trial and resolution of the merits of plaintiffs claims of racial discrimination, the meaning of Title VII would be of undoubted importance in ascertaining the appropriate scope of injunctive relief. But the merits of those claims had been resolved by the 1980 consent decree. Once that decree was

approved, any claims for additional relief were to be judged by reference to the terms of the settlement itself. "[S]ince consent decrees and orders have many of the attributes of ordinary contracts, they should be construed basically as contracts, without reference to the legislation the [plaintiff] originally sought to enforce." United States v. ITT Continental Baking Co., 420 U.S. 223, 236-37 (1975). The "scope of a consent decree must be discerned within its four corners," United States v. Armour & Co., 402 U.S. 673, 682 (1971), not by reference to the claims or defenses which might have been asserted had the action gone to trial. "Few persons are in a better position to understand the meaning of a consent decree than the district judge who oversaw and approved it." Brown v. Neeb, 644 F.2d 551, 558 n.12 (6th Cir. 1981).

In the district court proceedings plaintiffs did not base their request for a preliminary injunction on an attempt to prove that the layoffs would violate Title VII, but argued, as the city notes, "that the proposed layoffs would violate the terms of the 1980 Decree." (City Petition, p.5.)[40/] The district court indicated it believed itself obligated to act if the proposed layoffs would have the very effect on the Fire Department work force "which the Consent Decree undertook to avoid." (J.A. 30). The court of

---

40/ Plaintiffs' Verified Application for Temporary Restraining Order asserted the layoffs and demotions would "effectively destroy the affirmative relief granted by this Court in the Consent Decree entered on April 25, 1980." (J.A. 21) Plaintiffs' Supplemental Memorandum in Support of a Preliminary Injunction contended the layoffs and demotions were "designed to thwart gains made by blacks in the last two years" and would "violate[] the spirit of the 1980 Decree." (Pp. 2-3).

appeals, in sustaining the preliminary injunction, also relied on the consent decree:

> The 1980 Decree imposes a duty on the City to engage in certain affirmative action in its hiring and promotion decisions.... The City contracted in the ... 1980 Decree[] to accomplish precisely that which the layoffs would destroy: a substantial increase in the number of minorities in supervisory positions.... [T]he City's announcement ... was in effect notice of the City's intended anticipatory repudiation of the ... 1980 Decree[]. The announcement notified Plaintiffs that (1) relief previously granted pursuant to the Decree[] would be diminished; and (2) prospective relief under the Decree[] would not be forthcoming. (City Petition A32-A33).

The court of appeals recognized that the plaintiffs and district court "merely sought to compel compliance with the terms and goals of the Decree[]." (Id. at A33).

The record in this case provides a substantial basis for the conclusion that plaintiffs would ultimately have prevailed in their challenge to the layoffs and demotions as originally proposed. First, many of the blacks slated for layoff or demotion had been hired or promoted by the city within the previous year in order to comply with the terms of the 1980 consent decree. Of the 18 blacks whom it had hired under the decree since April, 1980, the city sought to layoff 15.[41/] Of the 18 blacks whom it had promoted under the decree since April, 1980, the city sought to demote 14.[42/] Paragraph 9 and Exhibit A of the consent decree expressly required the city to give immediate promotions to nine specific black employees,

---

41/ See Appendix B to this brief.

42/ See Appendix C to this brief.

including Fred Jones, one of the named plaintiffs. Despite the fact that the promotions required by paragraph 9 and Exhibit A were not conditioned upon the city's financial position, the city proposed to demote Jones and five other Exhibit A promotees. Had the city announced in May, 1980, that it was refusing for financial reasons to make the promotions required by paragraph 9 and Exhibit A, the violation of the consent decree would have been obvious. The city's proposal in May, 1981, to rescind those very promotions in May was hardly a less palpable violation. The city's obligation to promote and hire the other blacks involved was equally unconditional.

Second, paragraph 6 of the consent decree obligated the city to take "reasonable good faith efforts" "to raise the black representation in each job classifi-

cation on the fire department to levels approximating the black proportion of the civilian labor force...." (City Petition A64)(Emphasis added).[43/] This obligation is equally unconditional; no circumstances are mentioned under which the city may take steps to actually lower black representation. The decree does make some allowance for unforeseen problems in providing that efforts to "increase" minority representation need only be "reasonable;" thus paragraph 6 might plausibly be read not to require the city to hire or promote new blacks into positions from which it was at the same time actually laying off or demoting whites. But that qualification falls far short of authorizing the city to reduce black representation. The United

---

43/ The city recognizes that paragraph 6 is not merely precatory, but creates an enforceable obligation. City Petition, p. 4.

States dismisses paragraph 6 by insisting that any reduction in the black work force is merely a "delay in achieving the order's goal." (U.S. Brief, p. 21 n.18). But the manifest purpose of the decree is to achieve that goal with all reasonable dispatch. Paragraph 8 requires the city to attempt to fill 20% of all promotions with blacks "[t]o insure as quickly as possible the attainment of [the] long range goal." (City Petition A65)(Emphasis added). The 50% hiring goal in paragraph 7 obviously has the same purpose. The United States may be in no hurry to see an increase in minority employment in the Memphis Fire Department, but under the consent decree time is clearly of the essence.

Third, the consent decree recites that its purpose is to ensure "that any disadvantage that may have resulted from past

hiring and promotional practices be remedied...." (City Petition A60-A61)[44/] The city and union correctly recognize that if a black had less seniority because of past discrimination, a layoff or demotion based on that reduced seniority would perpetuate and aggravate a "disadvantage that ... resulted from past hiring and promotional practices." Such disadvantages would also be perpetuated if, because of the discriminatory denial of a promotion, a black were excluded from a position in which no layoffs or demotions occurred; there were, for example, no demotions or layoffs in 1981 from the position of captain, but then as now virtually all the captains were white. The city and union

---

44/ See also id. at A64, ("The purpose of this decree is to remedy the past hiring and promotion practices of the Memphis Fire Department with respect to the employment of blacks....").

assert that, although the layoffs and demotions may well perpetuate the effects of past racial discrimination, the district court had no authority to prevent that perpetuation because Title VII does not authorize redress for disadvantages caused by the operation of a seniority system.[45/] But it is by the words of the consent decree, not of Title VII, that the district court's actions must be measured, and the decree states without any limitation an intent to correct "any disadvantage" rooted in past discrimination. (Emphasis added). The layoff or dismissal of a black employee because of lesser seniority or occupancy of a lesser position due to past discrimination would clearly thwart that stated purpose, and the district court correctly concluded that

---

45/ Union Brief, p. 21; City Brief, p. 27.

under the consent decree the city could not "lay people off in a manner that will perpetuate discrimination against black people." (J.A. 30-31)

The United States, however, in an argument embraced by neither the city or the union, asserts on no fewer than six occasions that the blacks who benefitted from the May 18 order were not victims of any unlawful employment discrimination, (U.S. Brief, pp. 9, 11, 12 n. 13, 20, 21, 29), claiming that this is "conceded[]." Id. at 20. But the record in this case contains nothing to substantiate that assertion, and the pleadings do not reveal any such concession. As a practical matter, neither party was in a position at the hearing of May 8, 1981, held only four days after the announcement of the proposed layoffs, to adduce evidence regarding which of the blacks affected were the victims of

past discrimination, or even to ascertain with certainty who those black employees would be.[46/] Counsel for the city actually objected at that hearing to the introduction of any evidence regarding discrimination that had occurred prior to the consent decree. (J A 58-59). The district judge, based on his familiarity with the extensive discovery that had occurred prior to the settlement of the case in 1980, concluded:

> [I]t would be naive not to realize that the Fire Department of this City was very discriminatory towards black people for years, and it really wasn't corrected properly until the Consent Decree was entered in this cause. 47/

46/ Of the three blacks who avoided layoff because of the May 18 order, two -- Johnson and McFadgon -- had been rejected for employment by the Fire Department in 1977.

47/ City Petition A73.

Regardless of whether, had a trial on the merits been held, the consent decree would have been construed to require the plaintiffs,[48/] or to permit the defendants, to adduce evidence regarding whether particular blacks were the victims of discrimination, the granting of preliminary relief in light of the unavoidably limited information available at the May 8, 1981 hearing, was clearly not an abuse of discretion.

The city and union repeatedly object that the decision of the district court imposed on the city new obligations to which it had never agreed. But their characterization of the requirements of the May 18 order as "new" is merely a con-

---

48/ Clearly no such proof was relevant to paragraphs 6 and 9 of the decree. See pp. 54-57, supra.

clusory method of reasserting their disagreement with the decision below that the proposed layoffs and demotions would have violated the 1980 consent decree. The fact that layoffs and demotions are not expressly mentioned in the decree did not mean that the city was free to violate or frustrate the provisions of the decree so long as it did so by means of layoffs or demotions. Under paragraph 17 of the decree, moreover, the district court is not limited to forbidding violations of the particularized requirements imposed by the decree, but can also issue "such further orders as may be necessary or appropriate to effectuate the purposes of this decree." (City Petition A69)(Emphasis added).

The court of appeals, in addition to sustaining the preliminary injunction as based on a plausible construction of the

decree, also held in the alternative that the district court had the authority to "modify" the consent decree to limit layoffs and demotions of black employees. (City Petition 2A, 12A, 31A-37A). This case does not involve a "modification" of the consent decree in the sense in which that term is used in United States v. Swift & Co., 286 U.S. 106 (1932). In Swift the defendants asked the Court to release them from provisions of a consent decree expressly forbidding them to operate retail meat markets or engage in other specified activity. This Court held that the express requirements of such a decree would not be lifted in the absence of "a clear showing of grievous wrong evoked by new and unforeseen conditions...." 286 U.S. at 119. Similarly, in Hughes v. United States, 342 U.S. 353 (1952), this Court declined to modify a consent decree to alter a provi-

sion expressly authorizing the defendant to own certain stock. 342 U.S. at 357-58. But the consent decree contains no such express reference to or authorization of layoffs or demotions on any particular basis; it is literally silent on the subject. There is in the decree no layoff provision to "modify."

The use and meaning of the term "modify" by the courts below derives from the opinion of Judge Bailey Brown in Brown v. Neeb, 644 F.2d 551 (6th Cir. 1981). In Brown v. Neeb, as here, the district judge had limited the layoffs of black employees, relying on a consent decree that dealt solely with hiring and promotions. Judge Brown concluded,

> [E]ven if layoffs by seniority were not proscribed by the consent decree as originally entered, the district court had the authority to, in effect modify the consent decree to

> proscribe layoffs by seniority. This is true since the district court ... determined that such was necessary, due to changed circumstances, to carry out the expressed purpose and goal of the consent decree.

644 F.2d at 565. The consent decree in Brown v. Neeb contained a section, similar to paragraph 17 in the instant case,[49/] empowering the court to enter "such further orders as may be appropriate to effectuate the provisions of the Order...." 644 F.2d at 555. Regardless of whether judicial action under such provisions is characterized as a "modification" of the more specific provisions, it remains action authorized by and within the four corners of the decree itself.

Even in the absence of paragraph 17, the order of the district court is sustain-

---

49/ See p. 64, supra.

able as an exercise of the inherent authority of federal courts to enter orders necessary to ensure that a change in circumstances does not frustrate the remedial provisions of a consent decree. In exercising that authority the standard to be applied is "whether the change [would] serve[] to effectuate or to thwart the basic purpose of the original consent decree." Chrysler Corporation v. United States, 316 U.S. 556, 562 (1942); see also United States v. United Shoe Machinery Corp., 391 U.S. 244, 248-49 (1968). "If a plaintiff can show that modification of the decree is crucial to the effectuation of the purpose the decree was intended to achieve, then a grievous wrong would be perpetrated if the decree was not modified." Gautreaux v. Pierce, 535 F. Supp. 423, 426 n.7 (N.D. Ill. 1982). Regardless of whether the steps which the city pro-

posed to take were technically a violation of the consent decree, the authority recognized in Chrysler Corporation v. United States and United States v. United Shoe Machinery Corp. was properly exercised to prevent actions which would have "virtually destroyed" the relief which plaintiffs had negotiated and obtained in and under the consent decree. (City Petition A32).

Petitioners contend that affirmance of the Sixth Circuit decision will discourage settlement of Title VII actions by prompting fears on the part of employers that consent decrees will be construed to impose new and unbargained for obligations. (City Brief, pp. 34-36; Union Brief, p. 25). But it could be argued with equal force that the reversal of that decision would deter settlements by raising fears on the part of Title VII plaintiffs that consent

decrees will be rendered nugatory by changing circumstances or subsequent interpretation. In reality, whenever an individual or organization enters into a written agreement, be it a consent decree, a contract, or a lease, there is always a danger that the document will be interpreted more broadly or narrowly than may be desired. Better drafting, not rules of construction guaranteeing success in litigation to one party or the other, is the traditional and appropriate method of minimizing such risks. Regardless of the outcome of the instant litigation, its primary impact on Title VII settlements will be to prompt the attorneys negotiating future consent decrees to spell out with precision how any layoffs and demotions are to occur, rather than agreeing to decrees which, as here, are concededly "silent" on

those issues. (City Brief, p. i, Union Brief, p. i).

The parties also appear to attack the particular form of injunctive relief awarded by the district court. The union accuses the court of having "abrogated" the seniority system. (Union Brief, p. i). The city charges that the trial judge with "requiring layoffs to be based upon racial considerations." (City Brief, p. i). The United States claims "the decree required the City to layoff employees in accordance with racial quotas." (U.S. Brief, p. 24).

The actual language of the May 18 order does not require any race-conscious standard be used for selecting the employees to be laid off. That injunction only limited the use of the seniority system

> insofar as it will decrease the percentage of black lieutenants,

> drivers, inspectors and privates that are presently employed....

(City Petition, A78)(Emphasis added). This order, even if extended to all positions in the Fire Department, still permitted the routine application of the seniority system in a wide variety of circumstances. First, as we have seen, whether seniority based layoffs would reduce the percentage of black employees depended on the total number of layoffs. If, for example, the city had chosen to lay off 21 privates rather than 24, there would have been no disparate impact.[50/] Thus, even though the May 18 order was subsequently applied to clerk typists, it had no effect there since "the original seniority system did not operate so as to reduce the percentage of minority employees." (City Brief, p. 8

50/ See Appendix D to this brief.

n.13). In addition, many positions remained all-white;[51/] layoffs there would have had no racial impact whatever. The May 18 order did not forbid the complete elimination of a position, since that would result in the laying off of all employees holding it, and the city subsequently proceeded to reduce employment in just that manner. (See City Petition A82-A83). Since the positions, and number of individuals in each, to be subject to layoff was not governed by the Layoff Policy, out remained in the discretion of the mayor (J.A. 83), a more sensitive consideration of where the layoffs were to be made would have satisfied the May 18 order without the slightest violation of the seniority system.

51/ In January, 1981, there were a total of 92 whites in all white positions. Exhibit C, Plaintiffs Supplemental Memorandum in Support of a Preliminary Injunction.

While this case was still pending in the district court, the union itself urged the adoption of a number of racially neutral plans entirely consistent with the May 18 order. The Firefighters Union attempted to persuade the city to avoid the necessity for layoffs by giving employees the option of taking voluntary unpaid leaves of absence in order to preserve the jobs of their colleagues.[52/] The American Federation of State County and Municipal Employees suggested that each employee be permitted or required to take off one day per month without pay.[53/] In its Answer, the Firefighters urged that the court enjoin all layoffs in the Fire Department (J A. 25), forcing the city to make the

---

52/ Memphis Commercial Appeal, June 25, 1981, p. 17.

53/ Id.

needed cuts in agencies which provided less essential services and which were not subject to the requirements of the consent decree. The mayor noted that the need for layoffs might be avoided simply by reducing the number of hours worked by some or all employees. (J.A. 38). The court observed that the city might achieve a similar result by providing incentives for early retirement. (J.A. 74). In this Court, the Amicus American Jewish Congress suggests a number of other racially neutral alternatives[54/] that might have been utilized.

But while there were thus a variety of racially-neutral methods available for complying with the May 18 order, the district court left the choice of method up

---

54/ Brief of the American Jewish Congress, Amicus Curiae, in Support of Respondents, pp. 28-39.

to the city. Plaintiffs took no position in the district court regarding how compliance should be achieved. It was the city, not plaintiffs or the trial judge, which selected the race-conscious plan that the city personnel director first described to the court on June 22, 1981. (J.A. 132). The district judge did not, as the city asserts, subsequently "require[] layoffs which contravened ... the seniority provisions" (City Brief, p. 37)(Emphasis added) or "impos[e] ... a race conscious layoff policy on an objecting municipality" (id.)(emphasis added); the court's June 25 order merely "approved" the method selected by the city itself. (City Petition A83).

The union, of course, is not responsible for the race-conscious plan chosen by the city. Here, as in the district court, the union objects to the city's choice. The trial judge, noting the

union's objections to the procedures for implementing that policy, observed "I didn't call for the layoff, but I'm certainly not going to be a vehicle to get in this dispute between the Union and the City...." (J.A. 138). The union, however, chose not to appeal from the June 25 order, and thus is not entitled to ask this Court to resolve its disagreement with the city about that plan.

The injunctive relief granted by the district court was, in comparison with the consent decree violations involved, quite limited. The temporary restraining order approved on May 4, 1980, had forbidden the city to lay off or demote <u>any</u> black employees; had the preliminary injunction contained a similar provision, it would have had the effect of raising the proportion of blacks in several positions, thus carrying out paragraph 5 of the consent

decree. Under the preliminary injunction actually entered, the city was permitted to lay off 18 black employees and to demote 5 others.[55/] The district court might have forbidden the city to lay off any employee hired as a result of the consent decree; had it so ruled the city would have been able to lay off only 6 black employees, rather than 18.[56/] The limited relief actually afforded by the preliminary injunction relief clearly did not constitute an abuse of discretion.

III. THE CONSENT DECREE, AS CONSTRUED BY THE COURTS BELOW, IS VALID

Assuming, arguendo, that the courts below correctly interpreted the consent

---

55/ See Appendices B and C to this brief, and Addendum A to the City Brief.

56/ See n. 55, supra. The court of appeals regarded district courts decision as reducing the city's obligations under the consent decree. City Petition A34.

decree, the union and city contend that the consent decree as so construed is invalid. The union asserts that the relief imposed by the district court "exceeds even that relief to which the City and respondents might permissibly have consented." (Union Brief, p. 22 n. 17). The city urges that the decree as construed below "conflicts with congressional purpose as clearly expressed in [Title VII] and as clearly expounded by this Court in prior cases." (City Brief, p. 26). The contentions of the city and union are of considerable importance since they would, if sustained, preclude the resolution through conciliation and settlement of a substantial portion of all Title VII cases.

The arguments of petitioners and of the United States are grounded on section 703(h) of Title VII, which immunizes certain seniority systems from challenge

under Title VII, and section 706(g) of Title VII which describes the remedial authority of a district court to enforce Title VII. All three acknowledge, as they must, that there are circumstances which, if found by a court after a trial on the merits, would require issuance of an order similar to that of May 18; such relief would be appropriate, for example, if a court held that the affected blacks were the victims of prior discrimination, or that the seniority system was not bona fide. They contend, however, that Title VII forbids a defendant from agreeing in a consent decree to the very relief for which it would be liable if plaintiffs prevailed at trial. Thus the United States urges "it is clear that the City could not unilaterally contract away the incumbent employees' seniority rights ..." (U.S. Brief p. 22 n. 20). The city repeatedly argues that

seniority relief can only be provided to "persons who have ... been adjudged victims of past discrimination." (City Brief, p. 29; see also id. at 26, 31, 33)(Emphasis added).

Whatever the merits of these contentions, their relevance to this case depends upon the assumption that the May 18 order required that more senior whites be laid off while less senior blacks remained at work. The United States contends, "As a result of the district court's decree, white firefighters with more years of service than black employees were furloughed ..." (U.S. Brief, p. 21). The city advises the Court that "non-minority employees with greater seniority than skipped-over minority employees were laid off ...." (City Brief. p. 9). The union represents that "[a]s a result of [this] order[], the City was required to lay off

... more senior incumbent nonminority employees..." (Union Brief, p. 26).

The facts of this case are otherwise. As is apparent from Addendum B to the City's brief,[57/] the three whites laid off as a result of the May 18 order, Harmon, Dennington and Darden, were all hired on November 5, 1979, the same day as the three blacks, Jones, Johnson, and McFadgon, who, as a result of that order, were "retained in position".[58/] Far from having "more years of service", as the

---

57/ See also Appendix D to this brief.

58/ The city declares that since 1974 blacks have been hired in numbers "far exceeding the minority percentage within the civilian labor force." City Brief, p. 29, n.25. In fact, the city did no hiring between 1974 and 1977. While it hired between 1977 and 1980, blacks were appointed in proportions that were somewhat lower than the rate at which blacks applied for employment.

United States asserts, those three whites had not served so much as a day longer than their three black co-workers. Since all six employees had identical seniority, the city's Layoff Policy could not, and did not, select those to be laid off on the basis of seniority. Rather, under paragraph 3(c) of the Layoff Policy (J.A. 85), when several employees have the same seniority, the choice of the employees to be laid off is to be made by city supervisory officials after reviewing the personnel records of the employees concerned. Where employees are deemed to have identical records, they are to be ranked alphabetically.[59/]

59/ The Layoff Policy provides that the ranking of employees with identical records and seniority is to be based on any method provided by an applicable Memorandum of Understanding with a union. (J.A. 85-86). The Memorandum of Understanding with the Firefighters calls for alphabetization. (J.A. 117).

In the instant case the city apparently concluded that the records of all employees hired on November 5, 1979, were indistinguishable, and therefore ordered those employees alphabetically. (See City Brief, Addendum B). Thus, under the Layoff Policy, McFadgon, Johnson and Jones were to have been laid off because "J" and "M" are after "D" and "H" in the alphabet, and because their employment records were only as good as, but not better than, those of Harmon, Dennington and Darden. The principle the city proposed to apply was not "last hired, first fired",[60/] but "simultaneously hired, reverse-alphabetically fired." Such a scheme is no more a "seniority system" than pulling names at random out of a hat. Whatever importance

---

60/ See City Petition, p. 5; Union Brief, pp. 11, 40.

Congress may have attached to rights acquired by greater length of service, Title VII evinces no intention to attach any talismanic significance to the sort of arbitrary method utilized under the Layoff Policy.

Even if the May 18 preliminary injunction had affected seniority rights rather than alphabetical rights,[61/] that order, and the consent decree being so enforced, would not have transgressed the provisions of Title VII. First, section 703(h) of Title VII does not insulate a seniority system from alteration in the fashioning of a remedy. Rather, that section helps to

---

61/ The preliminary injunction did result in demotions of more senior whites in place of less senior blacks. City Brief, A5-A8. The seniority system in the Memorandum of Understanding, however, applies only to layoffs. (J.A. 116-119). See also n.15, supra.

define what is and is not a violation of the Act, see e.g., Teamsters v. United States, 431 U.S. 324 (1977), but it in no way limits the remedial authority of the federal courts. Franks v. Bowman Transportation Co., 424 U.S. 747, 758 (1976). In the instant case it is the language of the consent decree, not the terms of Title VII, which determines the relief to which respondents are entitled to relief.

Second, Petitioners do not deny that a plaintiff could, consistent with Title VII, win at trial relief similar to or even broader than that contained in the May 18 order. They urge, however, that a defendant may not agree to, and a court should not approve, a settlement containing precisely the same relief. On this view an employer, however certain it might be of losing at trial, could not acquiesce in a

settlement which had any adverse impact on the seniority rights or expectations of white employees. The effect of such a rule would not be limited to consent decree provisions regarding layoffs; most remedial action traditionally contained in consent decrees would be also forbidden. Where seniority is a factor in promotions, for example, a consent decree establishing goals for future minority promotions would be invalid. Not a single black employee could receive a promotion in such a case unless and until a federal judge, after a hearing on the merits, first concluded that the employee was an "actual victim" of discrimination.

A Title VII case alleging discrimination in hiring, and seeking constructive seniority for the alleged victims of that unlawful practice, simply could not be settled on terms favorable to the plain-

tiffs. Disputes about whether a seniority system was bona fide, or about the identities of the blacks denied seniority because of discrimination, could never be resolved short of trial. The United States candidly acknowledges that this interpretation of Title VII would, in the view of the Equal Employment Opportunity Commission, "call into question numerous extant consent decrees and conciliation agreements to which the EEOC is a party."[62/] (U.S. Brief p. 24 n. 23).

62/ This observation applies with equal force to the many judgments and consent decrees to which the United States is a party because the United States' position in this case is a recent departure from the consistent position it has taken in prior years. For example, in a brief filed in the Third Circuit on December 13, 1976 in EEOC v. American Telephone and Telegraph Co., 556 F.2d 167 (3d Cir. 1977), cert. denied, 438 U.S. 915 (1978) the United States and the E.E.O.C. argued that

> The district courts remedial authority under Section 706(g) ... to order race ... conscious goals to correct

62/ continued
the effects of past discrimination is not limited by Sections 703(a), (j) or (h).

Respondents have reproduced the Government's persuasive argument to the Third Circuit at Appendix E of this brief.

It should also be noted that the present position of the United States is in direct contravention of existing regulations and guidelines of several Federal Agencies, including those of the Department of Justice. See, e.g., Affirmative Action Appropriate Under Title VII of the Civil Rights Act of 1964, As Amended, 29 C.F.R. § 1608 (1982) (specifically endorsing the use of goals and timetables in affirmative actions plans "regardless of whether the persons benefited were themselves the victims of ... past discrimination,") 29 C.F.R. § 1608.4(c). The regulations promulgated by the EEOC are particularly persuasve for Congress has directed that the EEOC coordinate efforts by all federal agencies to enforce equal employment opportunity laws and policies. See 42 U.S.C. § 2000e-14, as amended by Reorganization Plan No. 1 of 1978, 43 Fed. Reg. 19807 (1978). See also Executive Order No. 12067, requiring the EEOC to "provide leadership and coordination to the efforts of Federal departments ... to enforce all Federal statutes ... which require equal employment opportunity ..." 43 Fed. Reg. 28967 (July 5, 1978). See also Brief for petitioners the United States and the Equal Employment Opportunity Commission, United Steelworkers of America v. Weber, No. 76-432, at 26-35, reprinted 42 Op.

The United States and petitioners appear to go even further, and urge that a consent decree is invalid if it provides any relief to a black who is not a proven victim of discrimination. (City Brief, pp. 23-30; Union Brief pp. 30-37, United States Brief, pp. 23-29). They rely on section 706(g) of Title VII, 42 U.S.C. § 2000e-5(g), which provides in part:

> No Order of the court shall require ... the hiring ... or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was ... refused employment or advancement ... for any reason other than discrimination.

Petitioners contend that this provision is fully applicable to a consent decree, and prohibits a court from ordering into

---

62/ continued

Att'y Gen. No. 37 (Sept. 22, 1969); Uniform Guidelines on Employee Selection Procedures, Appendix (Policy Statement on Affirmative Action), 29 C.F.R. § 1607.17 (1982).

effect a consent decree which contains any of the relief specified in section 706(g) unless every minority beneficiary has been adjudged by the court to be the victim of discrimination. This contention, if sustained, would virtually abolish consent decrees in Title VII cases.[63/] Despite Ford

---

63/ The limitation on the settlement of civil litigation now advocated by the city, the union and the United States has no precedent in federal law. It would compel employers to defend practices and decisions they knew to be unlawful, and then to pay the prevailing plaintiffs an attorneys fee for work done at trials whose outcome was never in doubt. Requiring the trial of a substantial number of employment discrimination cases in which the plaintiffs and defendants are in complete agreement regarding the legal and factual issues involved might be justified if the language and legislative history of Title VII demonstrated implacable congressional opposition to settlement by consent decree. But that history and language reveal, on the contrary, that Congress expressed a particular preference for such voluntary resolution of Title VII litigation. Ford Motor Co. v. EEOC, 73 L.Ed.2d 721, 730 (1982); Carson v. American Brands, Inc., 450 U.S. 79, 88 n. 14 (1981); Occidental Life Insurance Co. v. EEOC, 432 U.S. 355,

Motor Co. v. EEOC, 73 L.Ed.2d 721 (1982), no court could approve, prior to trial, a consent decree ordering the hiring or promotion of a single individual. Equally impermissible would be consent decree awards of back pay, since section 706(g) applies to monetary as well as injunctive relief. Measured by the standard now advanced by the city, the consent decree in this case, even under the narrow construction urged by the city itself, would be invalid, since it required the promotion of

---

63/ continued

368 (1977). Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974). Any restriction on the scope of relief which may be encompassed by a consent decree would be inconsistent with the principle announced in Ford Motor Co. v. EEOC that "the legal rules fashioned to implement Title VII should be designed ... to encourage Title VII defendants promptly to make curative, unconditional job offers to Title VII claimants" 73 L.Ed.2d at 730.

13 named individuals, directed the payment of back pay to a larger group, and compelled the city to meet a goal of 50% minority hiring and 20% minority promotions, all without a judicial determination that any of the beneficiaries were actual victims of discrimination. This view, embraced by the United States as well, would invalidate the consent decree entered into in 1974 between the United States and the city, since that decree also established a 50% minority hiring goal. See also n.62, supra.

The extent to which petitioners' contentions would, if sustained, interfere with the routine settlement of Title VII litigation is illustrated by the complete inconsistency between the arguments now advanced by the city in attacking the May 18 order and the arguments the city made two years ago in defending the very consent

decree involved in this case. Following the announcement of the city's intention to enter into that decree, a group of white firefighters, including D. L. Orders, sought to intervene in this litigation and attempted to seek modification of that decree. In appealing from the denial of intervention, Orders made virtually the same argument now advanced by the city, objecting in particular to the 20% minority promotion goal. Orders contended:

> The Defendants did not adequately represent Appellants' interests when they agreed to promotion goals which have an adverse impact upon non-minority employees, the court not having found any past and continuing discrimination in promotions to warrant such equitable relief. Title VII does not allow preferential promotion to individuals not shown to be victims of past discrimination. ... Therefore, the district court erred in granting class-based relief to persons who are not identifiable victims of specific discrimina-

> tion.... To deprive non-minority employees of the expectations of advancement by promotional goals for minority employees absent a finding of continuing discrimination in promotions is an improper violation of ... their statutory rights under Title VII. 64/

The city responded:

> The facts reveal ... continuing past discriminatory practices [which] clearly support the use of the promotional goals provided for by the Decree.... [T]he entry of the Decree is a determination by the Court of Plaintiffs' ... probability of success on the merits.... [T]he Consent Decree providing for promotional goals is not improper as the Decree is a determination that Plaintiffs ... claims of past racial discrimination were supported by the facts... 65/

64/ Brief on Behalf of Proposed Intervenors-Appellants, Stotts v. Memphis Fire Department, No. 80-1489 (6th Cir.) p. 20. Orders advanced the same argument in this Court. See Petition for Writ of Certiorari, Orders v. Stotts, No. 82-204, October Term, 1982, pp. 28-29.

65/ Brief on Behalf of Defendants-Appellees' Stotts v. City of Memphis, No. 80-1469 (6th Cir.), pp. 13-14.

This brief was filed on March 5, 1981. Sixty-four days later the city submitted its first memorandum in opposition to the requested preliminary injunction at issue here, insisting "the Defendants have specifically denied any prior discriminatory conduct" and that "there is no judicial finding of discrimination by the Defendants...." 66/

In any event, nothing in section 706(g), its legislative history or the cases decided under Title VII support the position petitioners, the United States and the AFL-CIO now advocate. EEOC v. American Telephone & Telegraph Co., 556 F.2d 167, 177 (3d Cir. 1977), cert. denied, 438 U.S. 915 (1978). In view of the extensive treatment of this issue given by a number

---

66/ Defendants' Brief in Opposition to Plaintiffs' Application for Preliminary Injunction, p. 9.

of amici in support of respondents,[67/] we will not re-canvass the legislative history or the cases in this brief.

By its terms, section 706(g) applies only to judicial orders. It is not intended to limit voluntary agreements between Title VII plaintiffs and defendants, since it applies only to judicial orders and it does not limit conciliation agreements negotiated by the EEOC. It is inconceivable that Congress intended to prohibit the courts from approving the same settlements which were clearly permissible prior to the commencement of litigation, and which could be entered into without

---

67/ See, e.g., Brief of the Lawyers Committee for Civil Rights Under Law as Amicus Curiae and Brief of the Mexican American Legal Defense Fund as Amicus Curiae.

judicial approval if litigants so desired. See United Steelworkers of America v. Weber, 443 U.S. 193 (1979).

Petitioners' position was implicitly rejected by this Court in Carson v. American Brands, Inc., 450 U.S. 79 (1981). In that case the district court, applying an approach similar to that advanced by the city and union here, refused to approve a Title VII consent decree containing remedial relief provisions because they "did not rest solidly on evidence of discrimination and ... were not expressly limited to actual victims of discrimination". 450 U.S. at 87 n. 12; see 446 F. Supp. 780, 788-790 (E.D. Va. 1977). In holding that the district court's action constituted an appealable order, the Court commented:

> Courts judge the fairness of a proposed compromise by weighing the

> plaintiff's likelihood of success on the merits against the amount and form of the relief offered in the settlement.... They do not decide the merits of the case or resolve unsettled legal questions.

450 U.S. at 88 n. 14. If, as petitioners contend, consent decree relief affecting seniority rights can only be afforded to proven victims of discrimination, a court asked to pass on such a decree would be compelled to ascertain whether plaintiffs were certain of success and to "decide the merits of the case" of every minority employee to whom that relief was to be provided.

Petitioners' assertion that Title VII never authorizes injunctive relief benefitting non-victims is unfounded. Although proven victims of past discrimination are frequently the primary direct beneficiaries of judicially ordered relief, there are circumstances in which limiting relief

to that group would clearly frustrate the purposes to Title VII. An employer intent upon excluding blacks may choose to resort to methods of discrimination which make it impossible to determine who the victims of that violation were. Where an employer engages in racially selective word-of-mouth recruiting, for example, there is usually no way to determine which blacks would have applied and been hired had that not occurred. A similar result can be achieved simply by refusing to keep records of the names of unsuccessful applicants. If a court's inability to identify the victims of discrimination automatically precluded remedial relief in such cases, racist employers would have a foolproof method for excluding minorities from some or all positions.

In addition, in a number of situations the actual victims of discrimination will

predictably have no interest in injunctive relief which is not awarded until long after the violation at issue. Casual laborers denied jobs by a construction company may still want those positions a year after that violation, but college teachers denied employment at one school are likely to accept positions at other institutions possibly hundreds or thousands of miles away, and be understandably unwilling to endure the professional and personal upheaval involved in returning to the school which first rejected them.[68/] In such a case, on petitioners' theory, the employer would be guilty of a clear violation of the law, the white beneficiaries of that illegal conduct would be known, and yet the federal courts would be powerless

---

68/ Cf. Ford Motor Co. v. EEOC, 73 L.Ed.2d 721, 737 n.27 (1982).

to order remedial injunctive relief.

The purposes of Title VII, moreover, extend beyond providing protection for minority employees and job applicants. As the United States reminded this Court several years ago:

> Congress ... recognized when it extended Title VII to state and local governments ... [that] the effects of employment discrimination in this setting extend well beyond the loss of employment opportunities by particular individuals. Such discrimination deprives [a public] agency of the perspective of minority groups regarding the impact of its programs on minorities; it fosters distrust on the part of minorities of governmental functions carried out by personnel who are not representative of the community at large ... and it sets a highly visible example of discrimination, or acquiesence, in the results of past discrimination. 69/

69/ Brief of the United States and Equal Employment Opportunity Commission, Minnick v. Department of Corrections, No. 79-1213, p. 20.

Where past unlawful discrimination has brought about the exclusion of minorities from positions in such a public agency, Title VII requires that minorities be placed in those positions with all reasonable dispatch, regardless of whether the particular employees so excluded can be located. See n.62, supra and Appendix E. Vindication of the Fourteenth Amendment's prohibition against intentional discrimination, a prohibition not limited by any provision comparable to section 703(h) or section 706(g), certainly requires no less.

The Amicus AFL-CIO, in an argument not advanced by the Firefighters Union itself, asserts that the consent decree would be invalid to the extent that it overrides provisions of the Memorandum of Understanding between the city and the union. (AFL-CIO Brief, p. 2, n.1). The AFL-CIO acknowledges, however, that its view would

be irrelevant if that Memorandum did not create "legally enforceable seniority rights." (Id.) The reason why the Firefighters have refused to advance this argument is not obscure. In 1978, Firefighters Local Union 1784, the petitioner in this case, was sued for damages allegedly caused by an unlawful firefighters strike; the plaintiff grounded his cause of action in part on a claim that the strike violated the Memorandum of Understanding. The union insisted, in its defense, that that Memorandum was unenforceable:

> As it made clear in the case of Weakley Co. Municipal Electric System v. Vick, 309 S.W.2d 792 (Tenn. Ct. App. West. Sect. 1957), a labor contract or collective bargaining agreement between a municipality and a labor union is not enforceable in Tennessee. While a municipality and a union can enter into a memorandum of understanding or agreement regarding wages, hours and working conditions of employees, such an agreement is not enforceable in the courts. Thus, even if the document in question was a contract, plainitff

> has sued on an unenforceable contract.... 70/

This brief was filed by the same attorneys who now represent the union in this Court. The Tennessee courts have upheld the union's contention that its Memorandum of Understanding is unenforceable. Fulenwider v. Firefighters Association Local Union 1784, 649 S.W.2d 268 (Tenn. Sup. Ct., 1982).

CONCLUSION

The writs of certiorari should be dismissed on the ground that the controversy regarding the preliminary injunction

---

70/ Supplemental Memorandum In Support Of Local Union Defendant's Motion to Dismiss, Fulenwider v. Firefighters Association Local Union 1784, No. 84348 T.D., Tenn. Circuit Ct., 15th Circuit, p. 1.

is now moot. Should the Court conclude that this issue is not moot, the decision of the court of appeals should be affirmed.

Respectfully submitted,

THOMAS M. DANIEL
RICHARD B. FIELDS*
COX & FIELDS
707 Adams Avenue
Memphis, Tennessee
(901) 525-8601

JACK GREENBERG
O. PETER SHERWOOD
CLYDE E. MURPHY
RONALD L. ELLIS
ERIC SCHNAPPER
Suite 2030
10 Columbus Circle
New York, New York 10019
(212) 586-8397

BARRY L. GOLDSTEIN
Suite 904
806 15th Street, N.W.
Washington, D.C. 20005
(202) 638-3278

Attorneys for Respondents

* Counsel of Record

APPENDICES

APPENDIX A

EXHIBIT A to The 1980 Consent Decree

Immediate Promotions:

A. Fire Inspector
Curtis Richmond
William Carter
John Cooper
Raymond McGahee
Fred Jones

B. Deputy Fire Marshall
Norvell Wallace

C. Driver
Willie Taylor

D. Fire Prevention Super. in Inspection
Clarence Howard

E. Metro Arson Squad Inspector
Grafton Logan

Conditional Promotions:

A. Emergency Unit Lieutenant
Robert Young may have the next opening.

B. District Chief
Carl W. Stotts when he passes the District Chief's Test.

C. Firefighting Captain
Ben Lewis when he passes the Captain's Test.

D. Maintenance Mechanic
Fred Walton may have the next opening when available upon receipt of diesel mechanic certification.

APPENDIX B

Blacks Hired Pursuant to Consent Decree

Name	Position	Status
1 Mary Hopkins	Clerk Typist	
2. Laura Brown	Home Fire Safety Rep.	Laid Off
3. Olenda Clifton	Home Fire Safety Rep.	Laid Off
4 Carlene Franklin	Home Fire Safety Rep.	Laid Off
5. Tina Hunt	Home Fire Safety Rep.	Laid Off
6. Rida Ivery	Home Fire Safety Rep.	Laid Off
7. Doris Jackson	Home Fire Safety Rep.	Laid Off
8 Rufus Jefferson	Home Fire Safety Rep.	Laid Off
9. Carolyn Powell	Home Fire Safety Rep.	Laid Off
10. Willie Pruitt	Home Fire Safety Rep.	Laid Off
11. Rose Strong	Home Fire Safety Rep.	Laid Off
12. Frase Walker	Home Fire Safety Rep.	Laid Off
13. Rickie Stokes	Personnel Technician	Laid Off
14. Denite Matshews	Fire Alarm Operator	
15. Teresa Taylor	Fire Alarm Operator	
16. Sharlene Warren	Fire Alarm Operator	
17. Raymond Gales	Repairer	Laid Off
18. Gregory Hart	Auto Parts	Laid Off

APPENDIX C

Blacks Promoted Pursuant to Consent Decree

Name	Position Promoted To	Status
1. Norvel Wallace *	Fire Deputy Marshall	
2. Willie Taylor	Driver	
3. Johnny Harrison	Driver	Protected by injunction
4. Chester Anderson	Lieutenant	Protected by injunction
5. Ray Cobb	Lieutenant	Protected by injunction
6. Don Hulbert	Lieutenant	Protected by injunction
7. William Kegler	Lieutenant	Protected by injunction
8. Percy Alexander	Lieutenant	Protected by injunction
9. Quincey McKay	Lieutenant	Protected by injunction
10. Roscoe Tate	Lieutenant	Protected by injunction
11. John Alsobrook	Lieutenant	Demoted
12. William Carter *	Fire Inspector	
13. John Cooper *	Fire Inspector	
14. Fred Jones *	Fire Inspector	Protected by injunction
15. Grafton Logan *	Fire Inspector	Demoted
16. Raymond McGahee *	Fire Inspector	Protected by injunction
17. Curtis Richmond *	Fire Inspector	Demoted
18. Clarence Howard *	Fire Prevention Supervisor	Protected by injunction

* Promotion expressly required by Exhibit A of the Consent Decree.

APPENDIX D

Least Senior Privates, June 1981 -- Employees With Same Hire Date in Reverse Alphabetical Order

Name	Seniority Date	Race
1. Maury Tennyson	2-1-81	W
2. Harold Poston	1-24-81	W
3. Ken O. Ellis	12-17-80	W
4. Glenn Meadors	12-4-80	W
5. Raymond Ray	9-20-80	W
6. Ernest E. Hulbert	7-17-80	W
7. Charles T. Belk	4-17-80	W
8. Larry Kirby	1-18-80	W
9. Leo Winfrey	11-5-79	B
10. James Winfield	11-5-79	W
11. Dell Ray Travis	11-5-79	W
12. Terry Thaxton	11-5-79	B
13. William Starrett	11-5-79	W
14. John D. Payne	11-5-79	W
15. James F. Morgan	11-5-79	W
16. Harold L. Moore	11-5-79	B
17. Timothy B. Mitchell	11-5-79	W
18. Cornelius McFadgon	11-5-79	B
19. Michael Maxwell	11-5-79	W
20. Tommy Mansfield	11-5-79	W
21. Billy L. Mansel	11-5-79	W
22. Javier Lerma	11-5-79	W
23. Keith Jones	11-5-79	B
24. Willie Johnson	11-5-79	B
25. Amos Hester	11-5-79	B
26. Larry Harris	11-5-79	B
27. Larry Harmon	11-5-79	W
28. Alonzo Gardner	11-5-79	B
29. Gary Dennington	11-5-79	W
30. Stanley Darden	11-5-79	W
31. Roy Currie	11-5-79	B
32. Frederick Cotton	11-5-79	B

APPENDIX D2

33.	Norris Chism	11-5-79	B
34.	Franklin Cathley	11-5-79	W
35.	Thomas Burk	11-5-79	W
36.	William Bryant	11-5-79	W
37.	John Brown	11-5-79	B
38.	Ronald Braden	11-5-79	B
39.	Michael Bonds	11-5-79	B
40.	Daryl Anderson	11-5-79	W

APPENDIX E

A verbatim reproduction of pages 18-31 of Brief for the Plaintiffs-Appellees (EEOC and United States) sub mitted to the United States Court of Appeals for the Third Circuit in Nos. 76-2217, 76-2281 and 76-2285, Equal Employment Opportunity Commission v. American Telephone and Telegraph Co.

A. The district court's remedial authority under Section 706(g) and Executive Order 11246 to order race and sex conscious goals to correct the effects of past discrimination is not limited by Sections 703(a), (j) or (h).

The Congress has given the district courts broad remedial authority to "order such affirmative relief as may be appropriate ... or any other equitable relief as the court deems appropriate." Section 706(g).[14/]

14/ Section 706(g), 42 U.S.C. § 2000e-5(g) (Supp. II, 1972), is set out in an appendix to this brief.

In cases of racial discrimination, the "courts has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." Louisiana v. United States, 380 U.S. 145, 154 (1965). That principle is fully applicable to employment discrimination cases, and has twice been reaffirmed by the Supreme Court in construing the district court's authority and duty to order relief under Section 706(g). Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1976); Franks v. Bowman Transportation Co., 424 U.S 747 770 (1976). As the Court noted in Franks:

> The provisions of [Section 706(g)] are intended to give the courts wide discretion exercising that equitable power to fashion the most complete relief possible.' [424 U.S at 764, quoting from legislative history to

the 1972 amendments to Title VII, 118 Cong. Rec. 7168 (1972) 15/]

Each of the nine appellate courts which have confronted the issue has held that race conscious relief, including numerical goals, is appropriate, and may be necessary, under Section 706(g) and/or the Executive Order to correct the effects of racially discriminatory employment practices. E.g., United States v. International Union of Elevator Constructors, Local Union No. 5, 538 F.2d 1012 (3d Cir. 1976); Contractors Association of Eastern Pennsylvania v. Secretary of Labor, 442 F.2d 159 (3d Cir.), cert. denied, 404 U.S. 854 (1971); Boston Chapter NAACP v. Beecher, 504 F.2d 1017 (1st Cir. 1974),

---

15/ Reprinted in Legislative History of the Equal Employment Opportunity Act of 1972, Senate Committee on Labor and Public Welfare, Subcommittee on Labor, at 1848 (1972).

cert. denied, 421 U.S. 910 (1975); Associated General Contractors of Massachusetts v. Altshuler, 490 F.2d 9 (1st Cir. 1973), cert. denied, 416 U.S. 957 (1974); Rios v. Enterprise Association Steamfitters Local 638, 501 F.2d 622 (2d Cir. 1974); Patterson v. American Tobacco Co., 535 F.2d 257 (4th Cir. 1976); Morrow v. Crisler, 491 F.2d 1053 (5th Cir.) (en banc), cert. denied, 419 U.S. 895 (1974); NAACP and United States v. Allen, 493 F.2d 614 (5th Cir. 1974); United States v. Local 212 International Brotherhood of Electrical Workers, 472 F.2d 634 (6th Cir. 1973); United States v. Masonry Contractors Association of Memphis, 497 F.2d 871 (6th Cir. 1974); Southern Illinois Builders Association v. Ogilvie, 471 F.2d 680 (7th Cir. 1972); Crockett v. Green, 534 F.2d 715 (7th Cir. 1976); United States v. N.L. Industries, 479 F.2d 354 (8th Cir. 1973); United States

v. Ironworkers Local 86, 443 F.2d 544 (9th Cir.), cert. denied, 404 U.S. 980 (1971). The broad relief provided in such cases is designed to rectify discrimination against a class, and is not limited to identified victims of past discrimination.

The broad remedial authority of the courts under Section 706(g) and the Executive Order -- and specifically the authority to impose numerical relief -- was brought before the Congress in the course of the consideration of the 1972 amendments to Title VII. Senator Ervin introduced an amendment which would have prohibited federal agencies and officials from requiring "discrimination in reverse" by employing "either fixed or variable numbers, proportions, percentages, quotas or goals." 118 Cong. Rec. 1663 (1972) (Leg. History, supra, at 1042, 1044). His amendment was addressed to Title VII and Executive Order

11246, and was designed to limit the authority of the EEOC and the Secretary of Labor. Ibid. His amendment was opposed by Senator Williams, the floor manager, and by the minority floor manager, Senator Javits, who relied upon and had printed in the Congressional Record two decisions-- this Court's decision in Contractors Association of Eastern Pennsylvania v. Secretary of Labor, supra, and United States v. Ironworkers Local 86, supra, 118 Cong. Rec. 1665 (1972)(Leg. History, supra, at 1048). In opposing the amendment, Senator Javits argued that it would not only destroy the affirmative action concepts under Executive Order 11246, but would also "deprive the courts of the opportunity to order affirmative action under Title VII of the type which they have sustained in order to correct a history of unjust and illegal discrimination..." 118 Cong. Rec. 1665

(1972) (Leg. History, supra, at 1048). Similarly, Senator Williams argued that he was

> ... desperately afraid -- that this amendment would strip Title VII of the Civil Rights Act of 1964 of all its basic fibre. It can be read to deprive even the courts of the power to remedy clearly proven cases of discrimination. [118 Cong. Rec. 1676 (Leg. History, supra, at 1072)]

Senator Ervin's amendment was defeated that day by a vote of 22 to 44. 118 Cong. Rec. 1676 (Leg. History, supra, at 1074). Thus, we have very clear legislaive history not only of Congressional ratification and approproval of the broad remedial authority under Title VII and Executive Order 11246, but also clear ratification and approval of the authority to order numerical relief.

In the recent case of United States v. International Union of Elevator Constructors, Local Union No. 5, 538 F.2d 1012 (3rd

Cir. 1976), this Court rejected contentions that the imposition of affirmative remedies benefiting individuals who may not themselves have been victims of the unlawful discrimination were limited by Section 703(j).[16/] In so doing, the Court noted the "virtual unanimity in the lower federal courts that § 703(j) does not in this respect limit the courts' remedial powers." 538 F.2d at 1019. It also noted that in amending Title VII in 1972 Congress had indicated approval of the broad remedial authority of the courts, including the power to impose numerical remedies. The

---

16/ Although the Court's analsyis was directed to Section 703(j), its analysis is also dispositive of contentions that the relief in this case is barred by Section 703(a). See also Contractors Association of Eastern Pennsylvania v. Secretary of Labor, supra, 442 F.2d at 173. (Sections 703(a) and (j), 42 U.S.C. §§ 2000e-2(a) and (j), are set out in the appendix to this brief.)

Court pointed out that in the section-by-section analysis of the 1972 amendments,[17] Congress had expressed the view that:

> In any area where the new law does not address itself, or in any areas where a specific contrary intention is not indicated, it was assumed that the present case law as developed by the courts would continue to govern the applicability and construction of Title VII.

It also referred to the fact that Congress had rejected two amendments offered by Senator Ervin to forbid the courts from using numerical remedies to eliminate the effects of past discrimination after Senator Javits had cited the opinions in United States v. Ironworkers Local 86, supra, and Contractors Association of Eastern Pennsylvania v. Secretary of Labor, supra. Citing Runyon v McCrary,

---

17/ 118 Cong. Rec. 7166 (1972) (Leg. History, supra, at 1844.)

___ U.S. ___, 96 S.Ct. 2586 (1976), the Court in Elevator Constructors found this "unusually clear evidence that Congress approved the pre-1972 federal court interpretation of the scope of Section 706(g) remedial powers." 538 F.2d at 1012-13.

IBEW attacks the Court's analysis of the legislative history in the Elevator Constructors decision. As to one of the amendments offered by Senator Ervin, it argues that the amendment was primarily aimed at restricting the Office of Federal Contract Compliance; that in the two decisions cited by Senator Javits, the courts had found the remedies not to be preferential quotas; and that, because it cannot be determined why the amendment was defeated, the defeat cannot be read as a congressional approval of those decisions. Of the second amendment, IBEW contends that it had only been intended to extend the

preferential treatment prohibition of Section 703(j) to the OFCC. However, the debate over the former amendment made it clear that what was deemed to be at issue was both the requiring of affirmative action under Executive Order 11246 and the ordering of quota remedies by courts to overcome the effects of past discrimination. (See Leg. History, supra, 1046, 1048, 1072).[18/]

18/ In arguing against the adoption of the Ervin amendment, Senator Javits stated, 118 Cong. Rec. 1665 (Leg. History, supra, at 1048):

> I would also like to cite in that regard the opinion in the United States v. Ironworkers Local No. 86, 443 F.2d 544, decided in the Ninth Circuit Court of Appeals as recently as May of 1971, in which the court held, in a Title VII "pattern or practice" case, that there was an affirmative duty for minority recruitment where it was shown that there was past discrimination which now required correction, and that the court could order that correction affirmatively

IBEW'S contention that the value of the legislative history is diminished because in the two cases called to Congress' attention the remedies were found not to constitute preferential quotas (IBEW brief pp. 42-43) is unpersuasive. Any such statements in those decisions merely con-

---

18/ continued

> without violating section 703(j) related to preferential treatment of individuals of any group, and so forth, where there had been illegality. The court would not allow a respondent to profit from his own illegality under cover of section 703(j).
>
> Now, Mr. president, I am told, and I believe the information to be reliable, that under the decision made last week by Judge Bonsal in New York, in the Steamfitters case, an affirmative order was actually entered requiring a union local to take in a given number of minority-group apprentices.
>
> What this amendment seeks to do is to undo the Philadelphia plan and those court decisions. Incidentally, I take great pride in the fact that when the legality of the Philadelphia

stituted the legal conclusion that the relief was lawful. See, e.g., the aspects of the relief at issue in the Ironworkers case in the district court opinion, 315

18/ continued

plan was argued here, and we had an opinion of the Attorney General which held it lawful pitted against an opinion of the Comptroller General's Office which held it unlawful. I think I was the principal Senator who sustained the doctrine of legality. And I am very grateful, naturally, that the courts took that view.

So, there I believe that the amendment does two things, both of which should be equally rejected.

First, it would undercut the whole concept of affirmative action as developed under Executive Order 11246 and thus preclude Philadelphia type plans.

Second the amendment, in addition to dismantling the Executive order program, would deprive the courts of the opportunity to order affirmative action under Title VII of the type which they have sustained in order to correct a history of unjust and illegal discrimination in employment and thereby futher dismantle the effect to correct these injustices. (emphasis supplied).

F. Supp. 1212, 1247 (W.D. Wash. 1970). The legislative history makes clear that congress was not misled as to what was in fact at issue.

It is true, as IBEW notes, that it can never be completely determined why a particular amendment was defeated. However, that does not militate against a rule of statutory construction whereby the most logical inference is drawn, especially where the vote is overwhelming. The overwhelming rejection of the Ervin amendment was properly read by the Court in Elevator Constructors as a clear indication that Congress did not intend Section 703(a) or (j) to be a bar to such relief. 19/

19/ It is also noteworthy that Congress in 1972 in fact broadened the remedial language of Section 706(g) to include the words "or any other equitable relief as the court deems appropriate." In light of that fact, there is no merit in IBEW's attempt to rely on H. K. Porter v. NLRB, 397 U.S.

19/ continued

99 (1970) (IBEW brief, pp. 35-36), which held that the Board could not, even for remedial purposes, order the parties to reach agreement since Congress had never given the Board the authority to order employers and unions to agree. Here the district courts, subject only to constitutional limitations, have the broadest possible power to fashion relief.

IBEW (brief, pp. 31-32) places reliance on the last sentence of Section 706(g), which reads:

> No order of the courts shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled., or was refused employment or advancement or was suspended or dischaged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 704(a).

As noted above with respect to Sections 703(a) and (j), this Court and eight other courts of appeals have found that language not to be a bar to affirmative numerical remedies.

The appellants efforts to bring into operation the language of Sections 703(a) or (j) to bar the relief in this case because here, unlike the case of hiring goals, the expectation of incumbents are affected are without merit. As discussed infra, pp. 34-35, the Elevator Constructors case did involve relief affecting the interests of incumbents. Morover, it is simply impossible to read the language of those sections to permit relief in the hiring case while barring it in the case of promotions.

CWA and IBEW also contend that the override aspect of the decree and supplemental order is barred by Section 703(h) of Title VII.[20/] Both find support in Franks

---

20/ Section 703(h), 42 U.S.C. § 2000e-2(h), is set out in the appendix to this brief.

v. Bowman Transportation Co., 424 U.S. 747 (1976). Rather than supporting their position however, the Franks decision disposes of any contention that Section 703(h), restricts the relief available to correct prior discriminatory practices. In holding that Section 703(h) could not bar the grant of retroactive seniority to remedy discrimination the Court in Franks reasoned (424 U.S. at 758-59):

> On its face, § 703(h) appears to be only a definitional provision, as with the other provisions of § 703 subsection (h) delineates which employment practices are illegal and thereby prohibited and which are not. Section 703(h) certainly does not expressly purport to qualify or proscribe relief otherwise appropriate under the remedial provisions of Title VII, §706(g), 42 U.S.C. § 2000e-5(g), in circumstances where an illegal discriminatory act or practice is found. Further, the legislative history of § 703(h) plainly negates its reading as limiting or

qualifying the relief authorized under §706(g). 21/

21/ After examining the legislative history, the Court concluded (id., at 761-762).

> Accordingly, whatever the exact meaning and scope of § 703(h) in light of its unusual legislative history and the absence of the usual legislative materials, see Vaas [Title VII. Legislative History, 7 B.C. Ind. & Comm. L. Rev. 431 (1966)] at 457-458, it is apparent that the thrust of the section is directed towad defining what is and what is not an illegal discriminatory practice in instances in which the post-Act operation of a seniority system is challenged as perpetuating the effects of discrimination occurring prior to the effective date of the Act. There is no indication in the legislative materials that §703(h) was intended to modify or restrict relief otherwise appropriate once an illegal discriminatory practice occuring after the effective date of the Act is proved--as in the instant case, a discriminatory refusal to hire.
>
> (footnote omitted)

This Court so read the Franks decision in its Elevator Constructors decision, supra, stating (538 F.2d at 1019):

> Local 5 contends, however, that the enforcement provisions in § 706(g) are in effect limited by the unlawful employment practices prohibitions in §§703(h) and (j). The short answer to that contention is that § 703 defines violations, not remedies. The section binds employers and labor organizations. It binds the court to the extend that it curtails the court's power to find a violation, but § 703 is simply inapplicable to the relief which may be afforded once a violation has been found. Thus a court could not predicate a finding of violation upon the existence of a bona fide seniority system such as § 703(h) describes, or upon the mere failure to institute an affirmative action program of the kind to which § 703(j) refers. But the court's remedial powers are not limited by these provisions. That is made abundantly clear by the holding in Franks v. Bowman Transportation Co. supra, that artificial seniority may, pursuant to § 706(g), be awarded as a remedy for past discrimination.

As discussed infra, pp. 33-34, this decision was made in the context of relief

overriding the expectations of incumbents in favor of minorities not identified as victims of the prior discrimination. Thus this Court must have read the Franks ruling with respect to the reach of Section 703(h) as not limited to relief to identiable victims. This was a proper reading of that decision. The Court held that Section 703(h) merely defined violations and was not intended to permit seniority systems to stand as a bar to appropriate Title VII relief. There may be questions as to whether relief to persons not individually identified as victims is appropriate but there is simply no basis in the statute for reading 703(h) as a limitation on the authority to grant relief if otherwise appropriate.

CWA and IBEW also seek to rely on this Court's original decision in Jersey Central Power & Light Co. v. Local 327, IBEW, 508

F.2d 687 (3d Cir. 1975), and the subsequent per curiam decision remanding the cause to the district court, ___ F.2d ___, 13 FFP Cases 762 (3d Cir. 1976), after the Supreme Court had sent the case back for reconsideration in light of Franks, ___ U.S. ___, 96 S.Ct. 2196 (CWA brief pp. 21-32, IBEW brief, pp. 51-53). As this Court pointed out in Elevator constructors, supra, 538 F.2d at 1020, the Jersey Central decision "is not in point because it did not deal with the scope of judicial remedy afforded in 706(g) for a § 703 violation." The original opinion, dealing only with the question of whether the use of plantwide seniority to determine layoff status violates public policy (as expressed in Title VII), held that Section 703(h) precluded a finding of a Title VII violation even where such layoffs perpetuated past discrimination. 508 F.2d at 704-711.

The Court's opinion on remand merely holds that in light of Franks, layoffs of identified individuals who were shown to have been the victims of hiring discrimination would be a violation of Title VII, notwithstanding the provisions of Section 703(h).

It is true that the Jersey Central opinion on remand does appear to draw a distinction between identified and non-identified victims of previous discrimination. In the context of the layoff situation before the Court in that case and in view of the emphasis in the original opinion on the "intention to discriminate" as the sole exception to the bona fides of a company service seniority system (508 F.2d 711), that distinction may have validity. Where persons have lower seniority because of a discriminatory refusal to hire at an earlier date, the reduced seniority is plainly the result of an

intention to discriminate; where an individual was not a victim of hiring discrimination the lower seniority is not a result of an intention to discriminate as to that person.[22/] Whatever the merit of drawing such a distinction in the Jersey Central context, it is not inconsistent with the Court's reading of Franks in Elevator Constructors. Section 703(h) does not apply at all with respect to the remedy for past class discrimination which has been carried into a seniority system. There is thus no basis in Section 703(h) for distinguishing between identifiable victims and other members of the previously disadvantaged group if group relief is otherwise appropriate.

22/ Such an interpretation of 703(h) is consistent with opinions of the Fourth Circuit. See Patterson v. American Tobacco Co., 535 F2.d 257, 266 (4th Cir. 1976); Russell v. American Tobacco Co., 528 F.2d 357, 363 (4th Cir. 1975).

In sum, all of appellants' statutory objections to the authority of the district court to order the relief at issue in this case are foreclosed by the legislative history of the 1972 Act and the settled law of this Circuit.